UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 04-11488	)	
	)	
DENNIS J. BOOLMAN	)	
LYNN R. BOOLMAN	)	
	)	
Debtors	)	
	)	
	)	
FIRST FINANCIAL BANCORP	)	
	)	
Plaintiff	)	
	)	
vs.	)	PROC. NO. 04-1233
	)	
DENNIS J. BOOLMAN	)	
	)	
Defendant	)	

DECISION ON OBJECTION TO DISCHARGE

At Fort Wayne, Indiana on September 28, 2005.

This matter is before the court following trial of the issues raised in this adversary proceeding by which the plaintiff has both objected to the debtor's discharge and asked the court to determine that the defendant/debtor's obligation to it is a non-dischargeable debt. Because of the court's decision concerning debtor's entitlement to a discharge, it is not necessary to address the issue of dischargeability.

In its complaint, the plaintiff's challenge to the debtor's discharge was originally based upon sections 727(a)(2)(A) and 727(a)(3) of the United States Bankruptcy Code. 11 U.S.C. §§ 727(a)(2)(A) and 727(a)(3). At trial, however, the plaintiff's arguments were expanded to include objections to discharge under §§ 727(a)(2)(B) and (a)(4)(A) of the Bankruptcy Code. These additional objections were tried by consent, in the sense that the plaintiff announced its intention to proceed under these additional theories at the beginning of trial and actually introduced evidence in support of them, all without objection.

Rule 7015 of the Federal Rules of Bankruptcy Procedure makes the provisions of Rule 15 of the Federal Rules of Civil Procedure applicable to bankruptcy proceedings. Rule 15(b) addresses the issue of conforming the pleadings to the evidence presented at trial. It provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. Fed.R.Civ.P. 15(b).

The intent of this rule is "'to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties.'" Matter of Prescott, 805 F.2d 719, 725 (7th Cir. 1986) (quoting Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449, 456 (10th Cir. 1982)). "The fact that the amendment changes the legal theory of the action is immaterial so long as the opposing party has not been prejudiced in the presentation of its case." Matter of Nett, 70 B.R. 868, 871 (Bankr. W.D. Wis. 1987).

> The key factor in determining whether the pleadings have been amended is whether the issue has been tried with the express or implied consent of the parties. The test for such consent is whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amendment. Prescott, 805 F.2d at 725 (quotation marks and citations omitted).

Here, plaintiff clearly announced its intention to proceed with the additional challenges to the defendant's discharge at the beginning of trial and offered evidence in support thereof, all without objection or comment from the defendant. At no time, whether during trial or during the time for filing post trial briefs, has the defendant ever complained about or objected to the additional claims. Furthermore, the defendant was quite prepared to defend against these new claims at trial. He offered testimony concerning his own version of those events and his own explanations for the conduct complained of, and never complained about surprise, an inability to meet the claims or requested a continuance in order to be able to do so. Under these circumstances, although not raised by the pleadings, the objections to discharge based upon §§ 727(a)(2)(B) and (a)(4)(A) have been tried by the consent of the parties.

The plaintiff contends that the debtor should be denied a discharge pursuant § 727(a)(3) of the Bankruptcy Code due to his failure to keep financial records related to his business Boolman Auto Sales, a corporation. A discharge may be denied if a debtor "failed to keep . . . books, documents, records, and papers, from which the debtor's financial condition . . . might be ascertained . . ." 11 U.S.C. 727(a)(3). In order set out a prima facie case under this section, the plaintiff must show "(1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions." Meridian Bank v. Alten, 958 F.2d 1226, 1232 (3rd Cir. 1992).

Plaintiff's argument is based entirely on the debtor's inability or refusal to turn corporate tax returns and financial records over to the trustee.[1] Yet, the books and records which the statute requires are those which permit the debtor's financial condition or business transactions to be ascertained. The debtor in this case is an individual, not the corporation. While this individual happens to have been the sole owner and president of a corporation, the records the creditor is complaining about are those related to the business, in other words, the books and records of the

[1]The trustee has not filed anything with this court requesting turnover of these documents. Had he done so, and had the debtor then not complied with an order of the court, the issue would be a bit different. See, 11 U.S.C. § 727(a)(6)(A).

corporation. Just because the debtor happens to be the sole owner of a corporation does not make the corporation's property property of the debtor or somehow transform the corporation's books and records into the debtor's. See, Fowler v. Shadel, 400 F.3d 1016 (7th Cir. 2005).

The plaintiff argues that when the corporation was administratively dissolved by the Secretary of State, its assets reverted to its sole shareholder, as did the business records related to those assets. Thus, the corporation's records supposedly became the debtor's records for the purposes of § 727(a)(3). This is not an argument the court is willing to accept. To begin with, it is founded upon a broad construction of objections to discharge, rather than the narrow one the court is to apply. Matter of Juzwiak, 89 F.3d 424, 427 (7th Cir. 1996). Furthermore, the records of the corporation depict the finances of the corporation, not the debtor, regardless of the status of the corporation. In re Cromer, 214 B.R. 86, 99 (Bankr. E.D. N.Y. 1997). Consequently, any failure with regard to the corporation's books and records is not sufficient cause to deny the debtor a discharge. Accord, Cromer, 214 B.R. at 99; In re More, 138 B.R. 102, 105 (Bankr. M.D. Fla. 1992); In re Moran, 120 B.R. 379 (Bankr. W.D. Va. 1990).

The plaintiff's second challenge to the debtor's discharge is based on § 727(a)(2) which authorizes the court to deny a discharge to a debtor who:

> with the intent to hinder, delay, or defraud a creditor or an officer of the estate...has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed -
>
> > (A) property of the debtor, within one year before the date of the filing of the petition; or
> >
> > (B) property of the estate, after the date of the filing of the petition.
> > 11 U.S.C. § 727(a)(2).

In order to successfully oppose a debtor's discharge under § 727(a)(2), the plaintiff must prove that debtor hid or harmed either his own property during the year prior to bankruptcy, or property of the estate after the petition was filed, and that the debtor did so with the actual intent to hinder, delay, or defraud a creditor or the bankruptcy trustee. In re Heil, 289 B.R. 897, 907 (Bankr. E.D. Tenn. 2003). Direct evidence of such an intent is often unavailable, but it may be inferred from the facts and circumstances of the case and the debtor's conduct. In re Devers, 759 F.2d 751, 753-54 (9th Cir. 1985). These elements must be proved by a preponderance of the evidence. In re Serafini, 938 F.2d 1156, 1157 (10th Cir. 1991); In re Ratner, 132 B.R. 728, 731 (D. N.D. Ill. 1991); In re Kisberg, 150 B.R. 354, 357 (Bankr. M.D. Pa. 1992); In re Beausoleil, 142 B.R. 31 (Bankr. D.R.I. 1992).

Plaintiff's § 727(a)(2) objection has several different themes, the first of which involves a truck that once belonged to the debtor and could not be produced when it was requested by the trustee. While this vehicle may well have been transferred or concealed, the plaintiff did not prove when this may have been done. Instead, what that the plaintiff has asked the court to do is infer that the transfer or concealment took place either during the year prior to the petition or sometime after the petition, based upon little more than the fact that the debtor was not able to deliver it to the trustee when requested. That is not an inference the court is willing to make. Inferences must have some type of foundation in facts actually proved at trial and without such a foundation they are nothing more than improper speculation. See, United States v. Carroll, 212 F. Supp. 422, 432 (D.C. Ark. 1962). Here, regardless of which prong of § 727(a)(2) plaintiff tries to rely upon, the fundamental problem is that we do not know when this truck was disposed of, only that it is no longer around. The court cannot deny a discharge under § 727(a)(2) just because a piece of property was transferred or concealed at some unknown point in time. The statute has a temporal component that must be fulfilled with something more substantial than speculation.

Plaintiff makes additional challenges to the debtor's discharge under § 727(a)(2)(B) based upon conduct that undeniably occurred post-petition and involved the concealment, destruction and/or mutilation of property of the bankruptcy estate. These challenges involve items that were viewed by the trustee upon his original physical inspection and inventory of the property of the estate and were scheduled to be sold at auction, but when the trustee's representatives arrived to take them to the auction they were either missing or damaged. The missing asset category includes at least one Peterbilt wrecker and a Bobcat. When the trustee's representatives arrived to take possession of these items, Mr. Boolman informed them that the items were either gone or with a buddy someplace. As the debtor knew that the trustee intended to sell this property at public auction, it is a reasonable inference that the debtor arranged their absence in order to hide them from the trustee.

Not only did the debtor successfully hide the property from the trustee, but evidence was also presented that he damaged other items of property of which the trustee was able to gain possession, such as a pontoon boat, a Kenworth tractor, and a GMC van. When the pontoon boat was first inspected, it had a canopy and the frame for that canopy was apparently intact. Yet, when the trustee's representatives arrived to take possession of the boat, not only was the canopy missing, but its frame was badly damaged. The debtor's only explanation for this damage was that, contrary to appearances during the original inspection, the frame was already damaged. This, however, is a bit difficult to believe as the photographs taken at that time indicate that the canopy properly fit the frame and the trustee's representatives did not note any damage. The changes to the pontoon boat's condition were not limited to a bent frame and missing canopy. Between the time it was originally inspected and the time the trustee's representatives collected the boat for the auction, the motor was switched from an operational 120 horsepower Force motor to a non-operational Mariner motor. The clear inference here is that the debtor wanted to palm off an unusable motor on the trustee in an effort to keep one he considered more reliable for himself. Debtor's explanation that the boat would sell better with the (inoperable) Mariner motor is not only unbelievable, but also over looks the fact that both motors were property of the bankruptcy estate[2] and it is the trustee's decision – not the debtor's – as to how best to dispose of that property in order to maximize its value. See, 11 U.S.C. §§ 521(4); 704(1).

A similar type of equipment switch occurred with regard to a Kenworth tractor. This vehicle originally had aluminum alloy wheels and, based upon photos taken during the original inspection, good quality tires. After the inspection and before the scheduled auction, the debtor replaced these with steel rims and tires in a much poorer condition. Once again, the clear inference is that the debtor was trying to replace valuable components of the truck with less valuable ones, so that he could keep the best pieces for himself. The debtor's explanation, that he made the switch because some buyers prefer steel rims, is implausible and improperly attempts to usurp the trustee's role in deciding how to best administer the estate and maximize its value.

Another example of the debtor damaging property the trustee was planning to sell involves the removal of a battery from a GMC van. Although the van would not start when the trustee's representatives first attempted to collect it, it did have a battery. A few days later when they returned, not only had the battery been removed but the battery cables connecting it to the vehicle had been cut, apparently in order to facilitate the removal. Again, the clear inference here is that the debtor was attempting to salvage components from this vehicle before the trustee sold it so that he could keep them for himself.

[2]The Mariner motor was not disclosed on the debtor's schedules.

The plaintiff also argues that the debtor should be denied a discharge based on § 727(a)(4)(A) for making a false oath. Section727(a)(4) authorizes the court to deny a debtor's discharge where

(4) the debtor knowingly and fraudulently, in or in connection with the case -

(A) made a false oath or account[.] 11 U.S.C. §727(a)(4)(A).

Both requirements must be fulfilled. The debtor must have made a false oath or account and such false oath or account must have been knowingly and fraudulently made. In re Martin, 88 B.R. 319, 323 (D. D. Colo. 1988) (citing In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984)). Material omissions from the debtor's schedules may constitute a false oath for the purposes of this section, United States v. Ellis, 50 F.3d 419, 423-24 (7th Cir. 1995), as can false testimony given by the debtor during examination by the trustee, such as the meeting of creditors, or the court. Matter of Beaubouef, 966 F.2d 174, 178 (5th Cir. 1992). A matter is material "if it bears a relationship to the debtor's business transactions or estate, or concerns discovery of assets, business dealings or existence or disposition of [debtor's] property." In re Montgomery, 86 B.R. 948, 956 (Bankr. N.D. Ind. 1988). There is no requirement that creditors be prejudiced by the false statements. Montgomery, 86 B.R. at 957; In re Calder, 93 B.R. 734, 738 (Bankr. D. Utah 1988) (aff'd. 907 F.2d 953 (10th Cir. 1990)). "[R]ather, the question of materiality depends on whether the false oath was pertinent to the discovery of assets or past transactions." Montgomery, 86 B.R. at 957. The "knowingly and fraudulently" requirement of §727(a)(4) "may be inferred from the debtor's conduct or from the particular circumstances of the case." Ingersoll, 106 B.R. 287, 292 (Bankr. M.D.Fla. 1989). See also, Martin, 88 B.R. at 323; In re Bujak, 86 B.R. 30, 31 (Bankr. W.D. N.Y. 1988); Matter of Kilson, 83 B.R. 198, 203 (Bankr. D. Conn. 1988); In re Krich, 97 B.R. 919, 923 (Bankr. N.D. Ill. 1988); In re Zahneis, 75 B.R. 201, 203 (Bankr. S.D. Ohio 1987).

The debtor is required to accurately disclose its assets. This duty is absolute. Matter of Yonikus, 974 F.2d 901, 904 (7th Cir. 1992). See also, In re Riley, 128 B.R. 567, 570 (Bankr. N.D. Okl. 1991)("A debtor has an uncompromising duty to disclose whatever ownership interest he holds in property."); In re Lunday, 100 B.R. 502, 508 (Bankr. D. N.D. 1989). If there is doubt about whether or not to list certain items, the debtor should disclose them. See, Richardson v. Von Behren, 314 B.R. 169, 180 (Bankr. C.D. Ill. 2004). Initially this disclosure is made by filing a schedule of assets. 11 U.S.C. § 521(1). The instructions at the top of the list in question, Schedule B – Personal Property, specifically direct the debtor to "list all personal property of the debtor of whatever kind" and "[i]f property is being held for the debtor by someone else, state that person's name and address . . . ." The debtor was instructed that his obligation was to schedule all property which he had an interest, not just property in his possession. Furthermore, if the debtor is in possession of property belonging to someone else that is supposed to be disclosed at paragraph 14 on the Statement of Affairs. When the debtor signed his bankruptcy schedules and statement of affairs, he declared under penalty of perjury that the information they contained was accurate. Similarly, at the first meeting of creditors, he was asked, under oath, if he listed everything he owned and he replied that he had. These statements were not true.

At trial the plaintiff introduced evidence proving that many things are not included on the debtor's schedule of assets and statement of affairs which should have been, including numerous trucks, a motorcycle, a boat, a forklift, tools, firearms, a large television, surveillance equipment, and a Mariner motor. The debtor's various explanations for not listing these items differed, from the claim that he was storing an item for a friend, fixing an item for a friend, the item was not in his possession, or by just failing to answer the question at all. None of these explanations suffice.

Assuming that many of the vehicles in his possession belonged to someone else, and that the debtor was fixing them for his friends, they were clearly in his possession and should have been listed at the appropriate place on the statement of affairs. Completely omitted from the schedules were firearms belonging to the debtor that had been seized by the Jay County Sheriff's office. The debtor's explanation that he didn't list them because they were not in his possession and he did not know if they would be returned to him does not excuse the failure to schedule them. Yonikus, 974 F.2d at 904. The failure to list other items, such as a big screen television, surveillance equipment, trucks, boat, snowmobile, forklift and Bobcat, which were all photographed by the trustee during his inspection of the debtor's property, was not explained.

While failure to disclose one item may not be sufficient cause to deny the debtor a discharge, a pattern of such failures is more than sufficient to do so. In re Rosenzweig, 237 B.R. 453, 457 (Bankr. C.D. Ill. 1999; In re Clawson, 119 B.R. 851, 852 (Bankr. M.D. Fla. 1990); In re Muscatell, 113 B.R. 72, 74 (Bankr. M.D. Fla. 1990). Here the debtor/defendant not only failed to include many items on the schedules and statement of affairs, but also testified under oath that he owned no property other than what was listed. He not only failed to disclose a multitude of items of personal property on the schedules and statement of affairs, but also lied under oath at the first meeting of creditors regarding this property and its whereabouts. While the defendant has repeatedly stated that he never tried to defraud the court, his actions speak louder than his words. In re Tully, 818 F.2d 106, 112 (1st Cir. 1987). Either he consciously lied about his assets when he listed them in schedule B, completed the statement of affairs and testified at the meeting of creditors, or he was recklessly indifferent to the accuracy of the information he provided. In re Korte, 262 B.R. 464, 473-74 (8th Cir. BAP 2001). In either event, these false oaths can, quite properly, be characterized as knowingly and fraudulently made, Martin, 88 B.R. at 323, and they clearly involved material information.

A discharge in bankruptcy is a privilege and requires complete honesty of the debtor. In re Krich, 97 B.R. 919, 924 (Bankr. N.D. Ill. 1989). This debtor has not been fully honest since the inception of the case. His actions demonstrate a clear intent and desire to keep property from the trustee in a variety of ways, whether by lying about what he owned, hiding property from the trustee and damaging property the trustee was able to take possession of. These are not the actions of an honest debtor or of one who deserves a discharge. The debtor's discharge will be denied.

Judgment will be entered accordingly.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court